Rubenstein v. Frey Doc. 61

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE "A MILLION LITTLE PIECES" LITIGATION

No. 06-md-1771

Hon. Richard J. Holwell

DECLARATION OF KIMBERLY K. NESS IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT.

I, Kimberly K. Ness, hereby declare:

1. I am a Senior Project Administrator for Rust Consulting, Inc. ("Rust Consulting"). My business address is 201 South Lyndale, Faribault, Minnesota 55021. My telephone number is (507) 333-4567. I am over twenty-one years of age and authorized to make this affidavit on behalf of Rust Consulting, Inc. and myself. I submit this declaration to inform the Court of the notification process and other administrative duties performed in the above-captioned action. I am fully familiar with, and have personal knowledge of, the matters stated in this declaration. If called as a witness, I am competent to testify to these matters.

2. Rust Consulting specializes in class action notification and claims administration, including telephone support, website implementation and direct mail services. Rust Consulting was founded in 1976 and since 1989 has provided claims administration services for class actions containing up to 75 million class members in cases involving consumers, pension benefits, securities, product liability, insurance, antitrust, fraud, property, employment, discrimination, bankruptcy and other types of class action cases. We regularly provide large-scale notification, claim form request processing, claims validation and processing, website information on a settlement, check distribution, and claims administration services.

Dockets.Justia.com

3. Rust Consulting has extensive experience in class action settlement administration, having provided settlement administration services in class action cases involving employment, antitrust, securities fraud, property damage, product liability, insurance, and consumer issues. We have provided notification and/or claims administration services in more than 800 class action cases.

4. Rust Consulting was engaged by counsel to the parties in this action to administer the Proposed Settlement. Related duties included: a) printing and mailing of the Notice; b) website development and implementation; c) renting a post office box for receipt of Request for Exclusion Forms, Claim Forms, and other communications about the proposed settlement from the Class Members; d) establishing and maintaining a toll free number for class members to call for information regarding the settlement; e) receipt and processing of Request for Exclusion Forms; f) receipt and processing of Claim Forms; and g) receipt and processing of Class Member correspondence.

5. Rust Consulting obtained a mailing address (P.O. Box 1864, Faribault, Minnesota 55021-7119) to receive Claim Forms, Request for Exclusion Forms, Class Member correspondence, and undeliverable Notice Packages.

6. Rust Consulting received the text of the Notice from Class Counsel. Rust Consulting used and formatted the Court-approved notice attached to the Class Action Settlement Agreement. A draft of the Notice was prepared by Rust Consulting and approved by the parties' counsel. A true and correct copy of the final mailed Notice is attached hereto as Exhibit "A."

7. On May 20, 2007, Rust Consulting obtained from Defendant a database containing the names and addresses for each known Class Member who purchased the book *A*

Million Little Pieces from the Defendants directly. The database provided to Rust Consulting by Defendant contained data for 141 Class Member. Rust Consulting used the database provided by Defendant to create its own database to use in administering the settlement process (the "Database").

8. Rust Consulting printed Notices for each member of the class, using the information from the Database to individualize the Notices. Personnel from Rust Consulting conducted quality control checks throughout the printing of the Class Notices.

9. Before mailing this notice to these class members, Rust Consulting ran all of the listed addresses of these class member through the National Change Of Address database, to insure that Notice was sent to class members' most recent address. Rust Consulting mailed 141 Notices and Claim Forms on June 19, 2007, via first-class mail, postage prepaid.

10. Kinsella/Novak Communication, Ltd. (Kinsella) a sister company to Rust Consulting, is a leading advertising and notification consulting firm. Kinsella evaluated the unique characteristics of buyers of the Book in order to design a notice program that would be effective in reaching class members. Pursuant to the preliminary approval Order, Kinsella caused the Publication Notice, a true and correct copy of the Publication Notice is attached hereto as Exhibit "B," to appear in the required publications on two separate dates. Specifically, on June 24, 2007, the Publication Notice appeared in *USA Weekend*, a magazine insert that appears in 612 newspapers across all 50 states, and on July 1, 2007, the Publication Notice appeared in *Parade,* an insert that is included in 403 newspapers across all 50 states. At the time the Notice was published, the circulation of *USA Weekend* was approximately 22.7 million and *Parade* was approximately 32.7 million. The Publication Notice thus appeared in over 1000 newspapers, with a circulation of 55 million.

11. Rust Consulting established and maintains a website domain name (www.amlpsettlement.com) to enable members of the Proposed Settlement Class to: a) obtain general information on the Proposed Settlement; b) review and print the Notice Package; and c) review other court related documents. The Settlement Website, which was designed by Plaintiffs in connection with the Settlement Administrator and has been hosted by Rust Consulting, was launched on June 13, 2007, and includes all of the key documents relating to the settlement. Specifically, the Settlement Website allows class members to view (and download) the long-form Class Notice, the Publication Notice, the Preliminary Approval Order, and the Settlement Agreement. Moreover, the Settlement Website provides class members the ability to download claim forms. It also provides links directly to information regarding Class Counsel and a series of answers to frequently asked questions ("FAQs") relating to the settlement. As of Monday, September 17, 2007, the website has received more than 7,400 visits. More than 1800 visitors have visited the FAQs page, and more than 4,000 claim forms have been downloaded.

12. Rust Consulting has established and maintains a toll free phone number (1-866-459-3651) to enable members of the Settlement Class to receive general information on the settlement or to request a claim form. The toll-free number was activated in mid-June 2007, and has remained live since that point. The toll-free number has allowed class members to obtain additional information about the settlement, and to leave a message to order a copy of the settlement notice and claim form. As of September 15, 2007, the toll free number has received 1,227 total calls.

13. As of September 15, 2007, Rust Consulting received 28 Notice Packages as undeliverable return mail. Of the 28 undeliverable Notice Packages, 26 did not contain a U.S. Postal Service forwarding address. Rust Consulting continues to trace undeliverable Notice

Packages and re-mails a Notice Package where a new address is obtained. Of the 28 undeliverable Notice Packages, 2 contained U.S. Postal Service labels with readable forwarding address. Rust Consulting continues to re-mail Notice Packages with a forwarding address.

14. As of September 15, 2007, Rust Consulting did not receive any Request for Exclusion Forms.

15. Rust Consulting has received and processed Claim Forms. As of September 15, 2007, Rust Consulting received 1,345 Claim Forms from Class Members.

16. To date, the approximate total for notice costs in connection with the settlement is $334,984.00. The bulk of these costs ($332,484.00) are attributable to the expansive Publication Notice program described above.

I declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge. Executed this 21st day of September, 2007 in Faribault, Minnesota.

Kimberly K. Ness, Senior Project Administrator
Rust Consulting

Subscribed and sworn to me
this 21st day of September, 2007.

Notary Seal

SHIRLEY A. HANSON
Notary Public-Minnesota
My Commission Expires Jan 31, 2010

Exhibit A

AMLP Settlement Administrator
PO BOX 1864
Faribault MN 55021-7119

<<Name>>
<<Address1>>
<<Address2>>
<<City, State Zip Code>>

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE "A MILLION LITTLE PIECES" LITIGATION

No. 06-md-1771
Hon. Richard J. Holwell

NOTICE OF PROPOSED CLASS ACTION SETTLEMENT

IF YOU PURCHASED THE BOOK A MILLION LITTLE PIECES BEFORE JANUARY 26, 2006 IN ANY FORMAT, PLEASE READ THIS NOTICE CAREFULLY BECAUSE IT MAY AFFECT CERTAIN OF YOUR RIGHTS IN A PENDING LAWSUIT.

This Notice provides you with important information in connection with the settlement of a lawsuit concerning the book A Million Little Pieces. If you wish to recover money you must act by October 1, 2007. You should read this Notice carefully.

A federal court has authorized this Notice. This is not a solicitation from a lawyer. This Notice has been issued pursuant to Rule 23 of the Federal Rules of Civil Procedure and an Order of the United States District Court for the Southern District of New York (the "Court"). The purpose of this Notice is to inform you of the pendency and proposed Settlement of this Class Action lawsuit, and of the hearing to be held by the Court to consider the fairness, reasonableness, an adequacy of the Settlement. This Notice is not intended to be, and should not be construed as, an expression of any opinion by the Court with respect to the truth of the allegations in this litigation, or the merits of the claims or defenses asserted. This Notice describes the rights you may have in connection with the Settlement and what steps you may take in relation to the Settlement and this Class Action lawsuit.

WHY SHOULD YOU READ THIS NOTICE?

You should read this notice because you may be eligible to receive money from the settlement of a Class Action lawsuit relating to the publication of the book A Million Little Pieces.

WHAT IS THE LAWSUIT ABOUT?

James Frey is the author of the book A Million Little Pieces. Random House published the book in 2003. The book was marketed as a "memoir/literature." In early January 2006, it was reported on the Internet, various television programs, including a widely covered January 26, 2006 telecast of a nationally syndicated program, and other media outlets that certain facts in the book had been altered and that incidents had been embellished. Both prior to and following the January 26, 2006 telecast and many of the other reports referenced above, a number of putative class action lawsuits were filed claiming that purchasers of the book had been misled by the marketing of the book and would not have purchased the book had they known that certain facts in the book had been altered and that incidents had been embellished. These Class Actions were later consolidated into one action in a New York federal court. The parties have now reached an agreement to settle the actions and compensate purchasers of the book who claim they were misled.

WHY IS THIS LAWSUIT A CLASS ACTION?

In a Class Action, one or more people called Class Representatives sue on behalf of people who have similar claims. All of these people are referred to collectively as the settlement class, or individually as Settlement Class Members. One court resolves the issues for all Settlement Class Members, except for those who exclude themselves from the Settlement Class.

HOW DO I KNOW IF I AM A CLASS MEMBER?

The Court has preliminarily determined that the following persons are members of the Settlement Class:
All persons who purchased the book A Million Little Pieces in any format (including, but not limited to, in hardback, paperback, cassette, CD, or any other electronic media), on or before January 26, 2006.

WHY IS THERE A SETTLEMENT?

The Court did not decide on behalf of the Plaintiffs or the Defendants. Instead, Class Representatives and the Defendants agreed to a settlement. The Class Representatives and their respective attorneys believe the Settlement is best for all Settlement Class Members.

WHAT AMOUNT OF MONEY AM I ENTITLED TO RECEIVE?

Under the proposed Settlement, each Settlement Class Member is eligible to receive a refund up to the full purchase price of the book (or other media), so long as such refunds do not cause Defendants to pay more than $2.35 million for all costs associated with settlement. If the amount of refund claims exceeds the amount available for distribution, then each Settlement Class Member will receive a pro rata share of the amount available for distribution.

HOW DO I CLAIM MY SHARE OF THE SETTLEMENT?

To receive a refund, a Settlement Class Member must complete a Claim Form and submit it together with the front cover of the book (or other specified proof of purchase depending on the media purchased) by October 1, 2007. You can obtain a Claim Form by calling 1-866-459-3651 or you can download one from the following website: **www.amlpsettlement.com**. The Claim Form explains how to make a claim. If you do not submit a Claim Form, you will not receive any part of the settlement.

WHAT IS THE LEGAL EFFECT OF THE SETTLEMENT?

The Settlement provides for a broad release of all claims relating to the sale and marketing of the book. For the precise details of the broad release of claims, consult the Settlement Agreement on file with the Court or available at **www.amlpsettlement.com**.

WHO WILL DETERMINE IF THE SETTLEMENT IS FAIR?

The Court has ordered that a hearing be held on November 2, 2007 at 10:00 a.m. in Room 17B of the federal courthouse in Manhattan, located at 500 Pearl Street, New York, New York, to determine whether the proposed Settlement is fair, reasonable, and adequate and whether it should be approved by the Court; whether judgment should be entered dismissing the lawsuit with prejudice; and the amount of attorneys' fees and costs to be awarded to Class Counsel. The Settlement Hearing may be continued from time to time by the Court.

WHAT IF I OBJECT TO THE SETTLEMENT?

A Settlement Class Member wishing to object to the Settlement must file a written objection to it. Your written objection must be received on or before August 23, 2007. Your objection must list your name, address, telephone number and, if applicable, the name, address and telephone number of your attorney. Your objection must be accompanied by copies of any supporting papers or briefs you intend to submit in support of your objection. Objections must be mailed to the Court, Class Counsel, and Defendants' Counsel at the addresses listed below. You may also attend the Settlement Hearing. If you intend to appear personally or through personal counsel at the hearing, you must include a notice of intent to appear in addition to your objection and mail copies to the Court, Class Counsel, and Defendants' Counsel. **ANY CLASS MEMBER WHO DOES NOT OBJECT IN THE WAY DESCRIBED ABOVE SHALL BE DEEMED TO HAVE WAIVED SUCH OBJECTION AND SHALL NOT HAVE ANY RIGHT TO OBJECT TO THE FAIRNESS OR ADEQUACY OF THE SETTLEMENT.**

Clerk of the Court
Clerk of the Court
500 Pearl Street
New York, New York

Class Co-Lead Counsel
Larry D. Drury
Larry D. Drury, Ltd.
205 W. Randolph Street
Suite 1430
Chicago, IL 60606

Evan J. Smith
Brodsky & Smith, LLC
240 Mineola Blvd.
Mineola, NY 11501

Frey's Counsel
Derek J. Meyer
McDermott, Will
& Emery LLP
227 West Monroe St.
Chicago, IL 60606

Random House's Counsel
Mark B. Blocker
Sidley Austin LLP
One S. Dearborn St.
Chicago, IL 60603

WHAT SHOULD I DO IF I DO NOT WANT TO PARTICIPATE IN THE SETTLEMENT?

To exclude yourself from the Settlement Class, you must submit a written request for exclusion that includes your name and current address. Each request must also contain a signed statement that: "I/we hereby request that I/we be excluded from the proposed Settlement Class in the In re A Million Little Pieces Litigation." Requests for exclusion must be mailed to Settlement Class Counsel at the address listed above, and must be received no later than August 23, 2007. **DO NOT REQUEST EXCLUSION IF YOU WISH TO PARTICIPATE IN THE SETTLEMENT.**

If you validly request exclusion from the Class, you will (a) not be entitled to any of the Settlement Class benefits; (b) be excluded from the Class; (c) not be bound by any judgment entered in the lawsuit; and (d) not be precluded from prosecuting an individual claim, if timely, against the Released Parties based on the issues raised in the lawsuit.

If you do not request exclusion from the Class, you will be bound by all determinations or judgments in the lawsuit in connection with the Settlement entered into or approved by the Court, whether favorable or unfavorable to the Class, including the judgment ultimately rendered in the lawsuit.

WHAT IS THE DIFFERENCE BETWEEN EXCLUSION AND OBJECTING FROM THE SETTLEMENT?

Objecting simply tells the Court that you do not like something about the Settlement. You can object only if you stay in the Settlement Class. Excluding yourself is telling the Court that you do not want to be part of the Settlement Class. If you exclude yourself, you have no basis to object because the lawsuit no longer affects you.

WHO REPRESENTS THE CLASS?

The Court has appointed several individuals who purchased by book as Class Representatives and several attorneys who filed lawsuits as Settlement Class Counsel. The lead lawyers from the Settlement Class Counsel are:

Larry D. Drury
Larry D. Drury, Ltd.
205 W. Randolph Street, Suite 1430
Chicago, IL 60606

and

Evan J. Smith
Brodsky & Smith, LLC
240 Mineola Blvd.
Mineola, NY 11501

Class Counsel represent your interest in the lawsuit. You will not be charged for their services. Class Counsel will present a petition to the Court to be paid for their service to the Settlement Class. You may, however, hire your own attorney at your own expense to advise you in this matter.

WHO IS RESPONSIBLE FOR CLASS COUNSEL'S ATTORNEYS' FEES?

Settlement Class Counsel has indicated that they intend to petition the Court for an award of attorneys' fees for their work on behalf of the Settlement Class. Defendants have agreed not to take any position on this request. **You will not have to pay any attorneys' fees or costs; any amount awarded by the Court will be paid by Defendants and will be included in the $2.35 million maximum amount to be paid by Defendants.**

WHEN WILL I RECEIVE MY PAYMENT?

The Court will hold a fairness hearing on November 2, 2007 to decide whether to approve the Settlement. If the Settlement is approved, the payment of claims will be made within 60 days from the end of the claim period assuming no appeals have been filed. In the event there are appeals filed this would delay the process of payment of the claims.

DO I HAVE TO COME TO THE HEARING?

No. Settlement Class Counsel will answer any questions the Court may have.

WHERE CAN I GET ADDITIONAL INFORMATION?

This Notice is intended only as a summary of the lawsuit and proposed settlement. It is not a complete statement of the lawsuit or the proposed settlement. You may inspect the pleadings and other papers (including the proposed Settlement Agreement) that have been filed in this lawsuit at the Office of the Clerk, 500 Pearl Street, New York, New York. The Settlement Agreement is also available at www.amlpsettlement.com. If you have any questions about this Notice or the proposed Settlement, you may contact Class Counsel at the address listed above.

DO NOT CONTACT THE COURT OR DEFENDANTS FOR INFORMATION.

Dated: May 14, 2007 Judge Richard J. Holwell

INSTRUCTIONS

1. Please print your name carefully. A check will be sent to the person whose name appears in the claim form.
2. In the "Approximate date of purchase," it is sufficient to list a month and year of purchase, unless the purchase occurred in January 2006. If the purchase was made in January 2006, please give an approximate date.
3. In the "Total purchase price," you may include: (a) the actual cost of the book, (b) any sales tax, and (c) if purchased online, the cost of shipping, if any. You may not include any other costs.
4. In order to make a claim, you must tear off the front cover of the trade paperback and return it along with this claim form. If you purchased the book in a form other than the trade paperback version, please include the following:
   a. if you purchased the HARDCOVER, please tear off and send p. 163 of the book rather than the front cover of the book.
   b. if you purchased a CD, BOOK ON TAPE, or E-BOOK, please include any of the housing from your purchase (or, if you did not save such housing, any other form of proof of purchase)
   c. if you purchased the book in any other form, please include anything that shows proof of purchase.
5. Your claim form will be rejected as invalid if you do not include the appropriate proof of purchase.
6. You must fill out a separate claim form, and include the appropriate proof of purchase, for each copy of the book purchased. Please be aware, however, that no person may receive compensation for more than two copies of the book.

CLAIM FORM – A MILLION LITTLE PIECES SETTLEMENT

Name:	Approximate date of purchase:
Address:	Indicate type: ☐ Hardcover ☐ Paperback ☐ CD ☐ Book on tape ☐ E-book ☐ Other
City, State Zip:	Total purchase price:
Telephone Number	Purchased online? ☐ Yes ☐ No

Please fill out the above information completely. If the information you provide is insufficient to determine whether you are a Class Member, your claim may be rejected.

THE UNDERSIGNED DECLARES UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOLLOWING IS TRUE AND CORRECT:

a) To the best of my knowledge, the information provided in this claim form is true and correct;

b) I was misled by the marketing of A Million Little Pieces and would not have purchased the book if I had known prior to purchase that certain facts in the book had been altered and certain incidents had been embellished.

Signature:	Date:

PROOF OF PURCHASE: YOU MUST TEAR OFF THE FRONT COVER OF THE BOOK AND RETURN IT WITH THIS CLAIM FORM AS PROOF OF PURCHASE. IF YOU PURCHASED MEDIA OTHER THAN THE PAPERBACK VERSION, PLEASE CONSULT THE INSTRUCTIONS BELOW.

Mail this Claim Form, along with the front cover of the paperback (or one of the other proof-of-purchase items described in the instructions), to the following address:

AMLP Settlement Administrator
PO BOX 1864, Faribault, MN 55021-7119

YOUR CLAIM FORM MUST BE POSTMARKED TO THE ABOVE ADDRESS ON OR BEFORE OCTOBER 1, 2007.

If You Purchased "A Million Little Pieces" on or before January 26, 2006

You May Have A Claim To Money From A Class Action Settlement

If you purchased the book "A Million Little Pieces," on or before January 26, 2006, you may be part of a class action Settlement. As part of the Settlement, you may be able to file a claim for money. This Notice is just a summary. For more complete information, you should read the full Notice, which is available by calling the number or visiting the Website below.

What is the Class Action Lawsuit About?

Plaintiffs allege that purchasers of "A Million Little Pieces" were misled by the marketing of the book as a "memoir/literature," and that they would not have purchased the book had they known before purchasing that certain facts in the book had been altered and that incidents had been embellished.

What Are the Terms of the Settlement?

Under the terms of the Proposed Settlement, each class member is eligible to receive a refund up to the full purchase price of the book. If the number of refund claims exceeds the amount available for distribution, then each class member will receive a pro rata share of the amount available for distribution.

Who Represents Me?

The Court has appointed attorneys to represent the Class. Class Counsel will request the Court award attorneys' fees and expenses from the Settlement Fund. You may hire your own attorney, if you wish. However, you will be responsible for that attorney's fees and expenses.

What Are My Legal Rights?

- **If you wish to remain a member of the Settlement Class**, you do not have to do anything. But, to share in the Settlement Fund you must file a claim. If the Court approves the Proposed Settlement, you will receive the benefits described herein and be bound by all the Court's orders. This means you will drop any claims you may have against Defendants covered by the Settlement.
- **If you wish to file a claim,** you must complete a Claim Form. You can get a Claim Form by calling the toll-free number or visiting the Settlement Website listed below. Claim Forms must be signed and postmarked no later than October 1, 2007.
- **If you do not wish to be a member of the Settlement Class**, you must submit a letter to the Court postmarked no later than August 23, 2007. If you request to be excluded from the Settlement Class you cannot make a claim.
- **You can tell the Court if you do not like this Proposed Settlement** or some part of it if you do not exclude yourself. To object or comment, you must send a letter to the Court postmarked no later than August 23, 2007.

Will the Court Approve the Proposed Settlement?

The Court will hold a Final Approval Hearing on November 2, 2007 at 10:00 a.m. to consider whether the Proposed Settlement is fair, reasonable, and adequate and to consider the motion for attorneys' fees and expenses.

For a copy of the full Notice of Proposed Class Action Settlement and a Claim Form

Call toll-free: 1-866-459-3651 or visit: www.amlpsettlement.com

Or Write: AMLP Settlement Administrator, P.O. Box 1864, Faribault, MN 55021-7119